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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SAGUARO RESERVE, LLC, a Delaware limited liability company, Third-Party Plaintiff/ Appellant, v. STANTEC CONSULTING, INC., an Arizona corporation, Third-Party Defendant/ Appellee.	2 CA-CV 2009-0183 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20081383, C20082605, C20083133, and C20085285 (Consolidated)

Honorable Stephen C. Villarreal, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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V Á S Q U E Z, Judge.

¶1 Saguaro Reserve, LLC ("Saguaro") appeals from the trial court's judgment dismissing its third-party complaint against Stantec Consulting, Inc. ("Stantec"). Saguaro argues the court erred in finding its claims barred on the basis of res judicata because no final judgment had been entered in another lawsuit involving the parties. It also contends that, in any event, Stantec waived the right to challenge the claims on the ground of res judicata and that the claims Saguaro raised in its third-party complaint were not compulsory counterclaims it was required to assert in the other action. For the reasons set forth below, we affirm in part, reverse in part, and remand for proceedings consistent with this decision.

Factual and Procedural Background

¶2 "When reviewing the trial court's grant of a motion to dismiss a complaint for failure to state a claim, 'we must take the alleged facts as true.'" *Dube v. Likins*, 216 Ariz. 406, ¶ 2, 167 P.3d 93, 97 (App. 2007), *quoting Riddle v. Ariz. Oncology Servs., Inc.*, 186 Ariz. 464, 465, 924 P.2d 468, 469 (App. 1996). Saguaro is the owner and developer of Saguaro Springs, a residential development in Marana, Arizona. Saguaro contracted with Stantec for the provision of design and other services in the construction and development of Saguaro Springs. In May 2008, Stantec sued Saguaro ("the Stantec Action"), alleging Saguaro had failed to pay amounts it owed Stantec under five of the parties' contracts relating to the project. Saguaro did not file a timely answer to the complaint, and default was entered against it. In August, Saguaro filed an answer and

counterclaim. The trial court struck the answer as untimely filed and entered default judgment on Stantec's complaint. However, it explicitly permitted the counterclaim to "stand[] unaffected" by the judgment. The court denied Saguaro's subsequent motion to set aside the judgment.

¶3 While the Stantec Action was pending, Saguaro was involved in a separate lawsuit relating to Saguaro Springs with other contractors and subcontractors ("the Consolidated Action"). After Saguaro filed its motion to set aside the default judgment in the Stantec Action, but before the trial court ruled on that motion, Saguaro sought and was granted leave to file a third-party complaint against Stantec in the Consolidated Action and reasserted the counterclaims it had raised in the Stantec Action and asserted new claims as well. Stantec moved to dismiss Saguaro's third-party complaint in the Consolidated Action under Rule 12(b)(6), Ariz. R. Civ. P., on the ground that the claims asserted already had been raised in the pending Stantec Action. In response to the motion, Saguaro voluntarily dismissed its counterclaim in the Stantec Action. After ordering supplemental briefing on the issue whether the third-party claims amounted to compulsory counterclaims in the Stantec Action, the court dismissed Saguaro's third-party complaint. This timely appeal followed.

Discussion

I. Waiver

¶4 Preliminarily, we address Saguaro's argument that because "Stantec did not raise its argument that Saguaro's claims were compulsory and subject to *res judicata* until after Saguaro filed its voluntary dismissal of its [c]ounterclaim . . . in the

Consolidated [Action]," it has waived that defense. Saguaro asserts that Stantec never challenged the filing of the counterclaim in the Stantec Action and, instead, took the position that "Saguaro's [c]ounterclaim was unaffected by the default judgment and stood on its own." However, to the extent Saguaro is arguing "Stantec's failure to raise the issue as an affirmative defense in the Stantec [Action] constitutes waiver," it has forfeited that argument by not raising it below. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

¶5 In its reply to Stantec's supplemental motion to dismiss, Saguaro noted that "Stantec continues to change the basis for its Motion to Dismiss," but Saguaro never argued that Stantec had waived its right to assert this defense by failing to raise it in either the Stantec Action or the motion to dismiss it filed in the Consolidated Action. Indeed, when the trial court requested supplemental briefing on this issue, although Saguaro mentioned the "compulsory counterclaim [argument] . . . was new," it did not challenge Stantec's motion to dismiss on the ground it had been waived. Thus despite having had two opportunities to argue waiver to the trial court, it failed to do so.[1] We therefore do not consider this argument further. *Id.*; *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 39, 161 P.3d 1253, 1263-64 (App. 2007).

[1]For the first time at oral argument, Saguaro asserted it had raised this argument in a motion for reconsideration it filed with the trial court. However, the trial court summarily denied this motion. In any event, "[g]enerally, we do not consider arguments on appeal that were raised for the first time at the trial court in a motion for reconsideration," particularly when the opposing party was not given an opportunity to respond. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006).

¶6 Saguaro nevertheless contends it was "bad faith on the part of Stantec to state the [c]ounterclaim was unaffected by its default judgment in the Stantec [Action], then state the complete opposite in the Consolidated [Action] . . . only after Saguaro had voluntarily dismissed its [c]ounterclaim." To the extent Saguaro is arguing, under an estoppel theory, that Stantec is precluded from asserting a position inconsistent from the one it had taken in the Stantec Action, Saguaro has failed to support this contention with argument or citation to relevant authority. Therefore the estoppel theory, too, has been waived. Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief "shall contain . . . contentions . . . with respect to the issues presented, and the reasons therefor, with citations to the authorities . . . relied on); *In Re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 219, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider "bald assertion . . . offered without elaboration or citation to . . . legal authority).

II. Res Judicata

¶7 Saguaro contends the trial court erred in dismissing its third-party complaint based on res judicata because a final judgment had not been entered on its counterclaims in the Stantec Action, and because res judicata only applies when a final judgment has been entered. Indeed, much of Saguaro's argument on appeal is grounded on general res judicata principles. However, the court's ruling was based on Stantec's argument that the claims Saguaro raised in the third-party complaint constituted compulsory counterclaims in the Stantec Action, and by voluntarily dismissing them from that lawsuit, Saguaro should be precluded from raising them in a separate lawsuit. Thus, the court's ruling appears to have been based on the compulsory and, thus, claim-

preclusive effect of the Stantec Action counterclaims with respect to the same claims in the Consolidated Action and not upon general res judicata principles. "Compulsory counterclaims are subject to the principles of *res judicata*" if not asserted timely. *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992). *See also Brown v. Superior Court*, 137 Ariz. 327, 331, 670 P.2d 725, 729 (1983) (appellate court presumes trial court ruled on grounds raised in motion). Therefore, the dispositive issue in this case is whether Saguaro's third-party complaint contains claims that were counterclaims Saguaro was required to assert in the Stantec Action, thereby precluding Saguaro from asserting them in the Consolidated Action.[2]

¶8 We review de novo a trial court's dismissal of a complaint pursuant to Rule 12(b)(6), based on its application of a court rule. *See Dressler v. Morrison*, 212 Ariz. 279, ¶ 11, 130 P.3d 978, 980 (2006) (legal issues underlying dismissal of complaint pursuant to Rule 12(b)(6) reviewed de novo); *Haroutunian v. Valueoptions, Inc.*, 218

[2]In making this argument, Saguaro appears to be conflating the concepts of res judicata and compulsory counterclaims. To the extent Saguaro is arguing that, separate from the issue of whether its counterclaims were compulsory, res judicata would pose no bar to its third-party complaint, we agree. "[R]es judicata bars a second action between the same parties or their privies based on the same claim once a judgment on the merits has been entered in a prior proceeding." *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 40, 146 P.3d 1027, 1039 (App. 2006). Thus, for res judicata to apply, "there must [have] be[en] . . . a final judgment on the merits." *Matusik v. Ariz. Pub. Serv. Co.*, 141 Ariz. 1, 3, 684 P.2d 882, 884 (App. 1984). Here, as Saguaro points out, at the time its third-party complaint was dismissed, there had been no final judgment in the Stantec Action, by virtue of this court's reversal of the default judgment and remand for an evidentiary hearing on the issue of damages, *Stantec Consulting, Inc. v. Saguaro Reserve, L.L.C.*, 2 CA-CV 2009-0017 (memorandum decision filed Nov. 24, 2009), nor had there been a final judgment on its counterclaims due to the trial court's express exclusion of the counterclaims from any judgment it did enter.

Ariz. 541, ¶ 22, 189 P.3d 1114, 1122 (App. 2008) (de novo review of questions involving interpretation and application of court rules). Dismissal is only appropriate if, "assum[ing] the truth of the complaint's allegations, . . . the [party] would not be entitled to relief on any legal theory." *Forum Dev., L.C. v. Ariz. Dep't of Revenue*, 192 Ariz. 90, 93, 961 P.2d 1038, 1041 (App. 1997). And, in interpreting the claims raised in Saguaro's complaint, we must "construe[them liberally so] as to do substantial justice." Ariz. R. Civ. P. 8(f).

III. Nature of Counterclaims

¶9 Saguaro contends the trial court erred in dismissing its third-party complaint because none of its claims was a compulsory counterclaim in the Stantec Action. A party that fails to assert compulsory counterclaims in an action is "precluded by the judgment [in that action] from raising the same matter in [a] second action." *Biaett v. Phoenix Title & Trust Co.*, 70 Ariz. 164, 170, 217 P.2d 923, 927 (1950). "In other words, a compulsory counter claim must be asserted against a plaintiff . . . to avoid the application of *res judicata*." *Lansford*, 174 Ariz. at 419, 850 P.2d at 132. However, permissive counterclaims, which include "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim," may be asserted at the party's election as counterclaims or in an independent lawsuit. Ariz. R. Civ. P. 13(b); *see Kerby v. State*, 62 Ariz. 294, 304-05, 157 P.2d 698, 703 (1945).

¶10 "Compulsory counterclaims are those that arise from the same transaction or occurrence that is the subject matter of the opposing party's claim." *Lansford*, 174

Ariz. at 418-19, 850 P.2d at 131-32; *see also* Ariz. R. Civ. P. 13(a). Counterclaims are compulsory when "there is a logical relationship between the two claims." *Technical Air Prods., Inc. v. Sheridan-Gray, Inc.*, 103 Ariz. 450, 452, 445 P.2d 426, 428 (1968); *see also Occidental Chem. Co. v. Connor*, 124 Ariz. 341, 344, 604 P.2d 605, 608 (1979). Saguaro argues our case law does not provide substantive guidance as to what constitutes a "logical relationship" among claims. It urges us to conclude counterclaims are only compulsory when res judicata otherwise would bar them in a subsequent lawsuit. Saguaro argues its third-party claims are not related logically and therefore do not arise from the same transaction or occurrence as those raised in the Stantec Action because "proof of different or additional facts will be required to establish them." *See Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997) ("If no additional evidence is needed to prevail in the second action than that needed in the first, . . . the second action is barred [by res judicata]."); *E.C. Garcia & Co., Inc. v. Ariz. State Dep't of Revenue*, 178 Ariz. 510, 520, 875 P.2d 169, 179 (App. 1993) ("Two causes of action which arise out of the same transaction or occurrence are not the same for purposes of *res judicata* if proof of different or additional facts will be required to establish them."). However, our supreme court has expressly rejected the "same-evidence" test Saguaro urges.

¶11 In *Technical Air Products*, Technical Air Products, Inc. (Tapco) had contracted to buy a "Hot Forming Press" from Sheridan-Gray. 103 Ariz. at 450-51, 445 P.2d at 426-27. Sheridan-Gray shipped the press to Tapco's place of business, but Tapco was unable to operate it there due to city fire ordinances. *Id.* at 451, 445 P.2d at 427.

Tapco and Sheridan-Gray agreed that Tapco would send the press back to Sheridan-Gray's plant and Tapco could operate the machine there for a certain price per hour. *Id.* Sheridan-Gray later entered into a second agreement for its use of the press when Tapco was not using it, for a price dependent, in part, on the amount of Tapco's use. *Id.*

¶12 After three months, Sheridan-Gray gave Tapco a billing statement for the use of the press and offset the amount due by the amount of its own use. *Id.* Tapco paid a portion of the billing statement and refused Sheridan-Gray's demand for the remainder. *Id.* Sheridan-Gray filed a complaint for the amount due, and default judgment eventually was entered against Tapco after it failed to answer the complaint. *Id.* Tapco later filed a separate lawsuit against Sheridan-Gray, alleging it had wrongfully used the machine. *Id.* The trial court granted Sheridan-Gray's motion for summary judgment in the second lawsuit on the ground Tapco's claims were compulsory counterclaims that it had been required to assert in the prior lawsuit. *Id.*

¶13 On appeal, Tapco argued its claims were not compulsory counterclaims because they had arisen out of a different transaction than that at issue in Sheridan-Gray's complaint. *Id.* It contended Sheridan-Gray's complaint had been based upon the agreement for Tapco's use of the machine, whereas Tapco's complaint was based upon the later agreement for Sheridan-Gray's use of the machine. Tapco maintained that its complaint therefore did not arise out of the same transaction or occurrence. *Id.* Our supreme court defined the issue as not "whether [Tapco's] claim for wrongful use arose out of the very agreement that Sheridan-Gray sued upon in the first action, but . . .

whether there [wa]s a logical relationship between the two claims." *Id.* at 452, 445 P.2d at 428. It then rejected Tapco's argument, noting

> [t]wo agreements were made concerning the use of the same machine at the same location. The second agreement concerned Sheridan-Gray's use of the press. However, Tapco's suit is for the wrongful use of the machine, not the use pursuant to the second agreement. The whole affair is intimately bound up with the operation of the machine. The second agreement was incidental to the first. The alleged wrongful use of the machine cannot be said to have been incidental to either agreement. We therefore hold that Tapco's claim comes within the compulsory counterclaim rule . . . .

Id. Thus, in determining whether the claims constituted compulsory counterclaims, the court was concerned not with the evidence necessary to prove Tapco's claim, but the extent to which Tapco's claim for wrongful use bore a logical relationship to Sheridan-Gray's original claim for nonpayment.

¶14 In *Occidental*, our supreme court again applied the logical relationship test in determining that a second lawsuit between the same parties arose out of the same transaction or occurrence that was at issue in a prior lawsuit between them. 124 Ariz. at 345, 604 P.2d at 609. In that case, a farming operation, CSR, had entered into an agreement with Occidental Chemical Co., doing business as Best Fertilizers of Arizona, Inc. (Best), in which Best agreed to supply CSR the necessary chemicals for its 1975 cotton crop on an open account. *Id.* at 342, 604 P.2d at 606. In July of that year, the wrong chemicals were applied to CSR's crop, "severely damaging" it. *Id.* CSR sued Best for breach of contract and negligence in Best's "placing the chemicals . . . in such a manner that the [person] spray[ing] the crops could not determine the nature of the

chemicals." *Id*. Best filed an answer disputing the claim, and judgment was entered in favor of CSR after a trial on the merits. *Id*.

¶15 Eight months after judgment was entered, Best filed a lawsuit seeking to collect the balance due on the open account, which CSR had never paid. *Id.* CSR moved for summary judgment on the ground that Best's claim was barred because it should have been raised as a compulsory counterclaim in the original lawsuit. *Id.* The trial court agreed and granted summary judgment in favor of CSR. On review to the supreme court, Best argued its claim was not yet mature at the time its answer was due and, in any event, its claim was not compulsory because the prior action had been based on a claim of negligence, not the open account, and the claims thus had no relationship to each other. *Id*. at 342-43, 604 P.2d at 606-07.

¶16 The supreme court agreed that there existed a question of fact as to whether Best's claim was mature at the time its answer was due, and it reversed summary judgment. *Id*. at 343, 604 P.2d at 607. The court went on to address Best's second contention its claim was not a compulsory counterclaim, notwithstanding the issue of the claim's maturity. *Id*. at 344, 604 P.2d at 608; *see also Levin v. Hindhaugh*, 167 Ariz. 110, 111, 804 P.2d 839, 840 (App. 1990) (to be subject of compulsory counterclaim, claim must be mature).

¶17 In determining whether Best's claim in the second action constituted a compulsory counterclaim because it arose out of the same transaction or occurrence as CSR's original lawsuit, the court noted:

> [C]ourts have generally applied the test stated in Wright and Miller, *Federal Practice & Procedure*, Vol. 6, § 1410 (1971) at 42:
>
> 1. Are the issues of fact and law raised by the claim and counterclaim largely the same?
>
> 2. Would *res judicata* bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
>
> 3. Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
>
> 4. Is there any logical relation between the claim and the counterclaim?

124 Ariz. at 344, 604 P.2d at 608. However, the court stated there were "several deficiencies" regarding the first three factors "when viewed in light of the real purpose of Rule 13(a), Ariz. R. Civ. P., which is to allow the court to apply the rule to any counterclaim that from an economy or efficiency perspective could be profitably tried with the main claim." The court concluded, "the 'logical relation' test is the more acceptable test." *Id.*; *see also Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987) ("Like the federal courts, Arizona applies the liberal 'logical relationship' test to determine whether two claims arise out of the same 'transaction or occurrence.'"). Then, applying this test, the court determined that Best's claim in the second action was a compulsory counterclaim because "both the subject of the previous litigation between the parties (negligence in the application of chemicals) and the subject of this litigation (open account for chemicals supplied) logically relate to the raising of the 1975 crop by CSR." *Occidental*, 124 Ariz. at 345, 604 P.2d at 609.

¶18 Thus, as *Technical* and *Occidental* make clear, our supreme court has rejected any test for determining whether a claim is compulsory that looks to the similarity of the evidence or traditional res judicata principles, in favor of one that focuses on whether there is a logical relationship among the claims. However, even though these cases adopt the logical relationship test for determining whether claims constitute compulsory counterclaims, resolution of the question necessarily is dependent upon the specific claims asserted in each case. Here, Saguaro contends its claims are based on "serious failures in the infrastructure" of the development, due to "failures in services provided by Stantec," whereas "Stantec's claims were for alleged partial non-payment on only a handful of the contracts entered into between the parties." Stantec asserts the claims in the Consolidated Action are related sufficiently to the Stantec Action to have been compulsory counterclaims because "[t]he parties were the same, and the claims arose from the same actions and project."

¶19 We agree with Stantec that claims arise out of the same transaction and occurrence when the parties are the same and the claims arise out of the same contracts. However, neither *Technical* nor *Occidental* compels the conclusion that claims arise out of the same transaction or occurrence merely because they arise out of the same "project." In *Technical*, the supreme court rejected Tapco's argument that its claim was not a compulsory counterclaim because it was suing on a separate contract than that which was the basis for the original action. Although the contracts were "incidental" to each other, the causes of action were not, and "the whole affair [wa]s intimately bound up" in the same parties' use of the same machine in the same location. *Technical*, 103

Ariz. at 452, 445 P.2d at 428. And, in *Occidental*, the same contract for the provision of chemicals and the actual provision of those chemicals gave rise to CSR's breach of contract and negligence claims and Best's subsequent claim for nonpayment. *Occidental*, 124 Ariz. at 345, 604 P.2d at 609. Thus, the claims themselves must have a logical relationship; it is neither necessary nor sufficient that the claims generally arose out of the same factual background. We therefore reject Stantec's contention that by suing Saguaro on five of the contracts existing between the parties, Saguaro necessarily was required to assert as compulsory counterclaims any conceivable claim related to the Saguaro Springs development that it might have had against Stantec. A closer analysis of the relationship between the claims is required before it can be determined whether the third-party complaint contained compulsory counterclaims.

¶20 In its complaint, Stantec alleged Saguaro had failed to pay for services Stantec had performed under the infrastructure contract, the Phase 2 contract, the park contract, the construction contract, and the Phase 3 contract. Saguaro asserted the following in its third-party complaint: (1) breach of contract for Stantec's failure to abide by contract terms; (2) negligence due to Stantec's failure "to use reasonable care in the design, supervision, and inspection of the construction of the project" and to "minimize and mitigate damages, . . . creat[ing] an unreasonable and substantial risk of harm, which could have been prevented"; (3) breach of express and implied warranties that "all work would be performed in a proper and workmanlike manner"; (4) express indemnity requiring Stantec to "defend, indemnify and hold harmless Saguaro Reserve from losses, claims, sums paid, lost profits, and damages to the project incurred"; and (5) implied

indemnity for damages incurred as a result of construction defects and other damage to the project.

¶21 According to Saguaro, its "third-party claims were based on the more than twenty contracts entered into for the design and plan services, construction observation services, inspection services, certification services, and other services for the development of the Project, and the failures in the services provided by Stantec." Stantec contends there is no evidence in the record that these claims apply beyond the five contracts that were the basis for the Stantec Action.[3] Saguaro does not dispute that the "more than twenty contracts" upon which its claims are based include the five contracts upon which Stantec sued. Thus, to the extent the third-party complaint contains claims that relate to Stantec's performance under the five contracts that form the basis of Stantec's complaint in the Stantec Action, those claims necessarily are related logically to Saguaro's alleged failure to pay for work performed under those contracts.

[3]Stantec also contends Saguaro has raised this argument for the first time on appeal. Although Saguaro did not state below that its third-party complaint embraced more contracts than those raised in the Stantec Action, Saguaro did argue that because "the default judgment entered in the Stantec Matter specifically excluded Saguaro's counterclaim, Saguaro's counterclaims [as asserted in the third-party complaint] are not barred [as compulsory counterclaims]." Notwithstanding this somewhat inartful language, Saguaro clearly had raised in the trial court the question whether the third-party complaint was comprised of compulsory or permissive counterclaims. And, in entering a ruling and dismissing the complaint, the trial court necessarily concluded all claims asserted had been compulsory counterclaims. We therefore decline to find the argument waived. *See Crown Life Ins. Co. v. Howard*, 170 Ariz. 130, 132, 822 P.2d 483, 485 (App. 1991) (considering untimely raised issue when "trial court presumably considered . . . argument on its merits).

Consequently, they arise out of the same transaction or occurrence and therefore were compulsory counterclaims to the Stantec Action.

¶22 However, the breadth of the claims asserted in the third-party complaint also supports Saguaro's contention that the complaint pertains to more than the five contracts that were the basis for the original complaint. Taking Saguaro's allegations as true, as we must, Stantec has so deficiently performed with respect to all parts of the development project as to cause the Town of Marana to reject the work performed. Additionally Saguaro had to retain an expert to assist in the repair and remediation of the construction failures. On the record before us, it is impossible to know for certain whether the third-party complaint contains additional, non-compulsory claims.[4]

¶23 Here, the parties apparently negotiated separate, independent contracts for each of the various functions that Stantec had agreed to perform for Saguaro. However,

[4]In particular, we note Saguaro added two indemnity claims to its third-party complaint that were not asserted as counterclaims in the Stantec Action. Third-party indemnity claims generally are not ripe "until the indemnitee has suffered actual loss through a judgment or payment thereon." *Levin v. Hindhaugh*, 167 Ariz. 110, 111, 804 P.2d 839, 840 (App. 1990). However, "[a] third-party indemnity claim may be filed before it accrues, in order to promote settlement of all claims in one action . . . [, although] such claim cannot be determined before the underlying claim establishing liability and damages is determined." C.J.S. *Indemnity* § 45 (2010). Because these claims are predicated on a finding of Saguaro's liability to a third party based upon its contracts with those parties, we question whether they, in particular, appropriately were characterized as compulsory counterclaims to the Stantec Action. But, because Saguaro failed to make any independent argument to this court or below concerning their ripeness at the time of the Stantec Action, we do not address the matter further. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (arguments not raised below waived); *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, n.10, 181 P.3d 219, 240 n.10 (App. 2008) (arguments not raised in briefs abandoned). The trial court may consider their survival with the rest of the claims on remand.

there is no evidence that the claims asserted in the Consolidated Action are "intimately bound up with" the claims asserted in the Stantec Action. *See Technical*, 103 Ariz. at 452, 445 P.2d at 428. Thus, we cannot conclude on the record before us that any claims pertaining to contracts other than those forming the basis of the Stantec Action are logically related. Questions of fact remain as to whether they arise from the same transaction or occurrence as the Stantec Action.

¶24 Therefore, as to those claims in Saguaro's third-party complaint that are related logically to the five contracts that form the basis of the Stantec Action, the trial court did not err in dismissing them because, pursuant to Rule 13(a), they had to be asserted as part of that action.[5] However, any claims that do not logically relate to these five contracts would constitute permissive counterclaims that, in the absence of an answer, Saguaro was entitled to dismiss and refile in the third-party complaint pursuant to Rules 13(b) and 41(a), (c), Ariz. R. Civ. P. It is for the trial court to determine upon remand, after taking such actions as may be appropriate and applying the principles discussed herein, whether Saguaro has alleged any claims that do not arise out of the same transaction or occurrence as the Stantec Action.

[5]Saguaro has abandoned any claim that Rule 41, Ariz. R. Civ. P., entitled it to dismiss voluntarily its compulsory counterclaims without prejudice and reassert them in a separate action by failing to make such an argument on appeal. Similarly, although Stantec claims in its statement of facts that the Stantec Action was stayed at the time of Saguaro's voluntary dismissal, it has not argued on appeal that in the event this court found any of Saguaro's counterclaims permissive Saguaro could not voluntarily dismiss and refile those counterclaims for any reason. Both arguments therefore are waived. *Clear Channel Outdoor*, 218 Ariz. 172, n.10, 181 P.3d at 240 n.10 (arguments not raised in briefs waived).

Disposition

¶25 For the reasons set forth above, we affirm the trial court's dismissal of the claims in the third-party complaint that involve Stantec's performance on the contracts it sued upon in the Stantec Action, because they constituted compulsory counterclaims that could not be sustained outside of that lawsuit. However, to the extent Saguaro asserted additional claims that pertain to other contracts, we reverse the court's dismissal of those claims, as they may arise from different transactions than those asserted in the Stantec Action. We therefore remand for further proceedings consistent with this decision. In our discretion, we deny both parties' requests for attorney fees on appeal. *See Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164, 876 P.2d 1190, 1199 (App. 1994) (award of appellate attorney fees in contract action discretionary).

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge